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IN THE

Supreme Court of the United States

TRACEY FAYE CORTEZ, AN INDIVIDUAL, PETITIONER

v.

AIR NEW ZEALAND LIMITED (USA)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents an issue of international importance for protection of air travelers, including United States citizens traveling abroad, not addressed by this Court in *Olympic Airways v. Husain*, 124 S. Ct. 1221 (2004):

> Does an international carrier's failure to adequately warn its passengers of a risk of death or serious bodily injury associated with certain conditions of air travel, a risk known to the airline but not its passengers, constitute an "accident" within the meaning of Article 17 of the Warsaw Convention.

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Petitioner seeks review of the opinion rendered herein by the United States Court of Appeals for the Ninth Circuit which is unpublished is the Ninth Circuit No. 03-56838. A copy of the Memorandum is reproduced in the Appendix as, (1a-3a)[1]. The order of the United States District Court for the Central District of California is unreported. A copy of the document is reproduced in the Appendix as, (4a-10a).

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was filed on October 2, 2006. The jurisdiction of this Court is invoked pursuant to 28 *U.S.C.* § 1254(1).

RELEVANT PROVISIONS INVOLVED

The Convention for the Unification of Certain Rules Relating to International Transport by Air, Oct. 12, 1929, 49 Stat., part II, p. 3000, TS No. 876 (1934), reprinted in 49 U.S.C. § 40105 (1997) ("The Warsaw Convention or Act")[2]

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[1] Citations to the Appendix to the Petition as _a.

[2] The Warsaw Convention has been amended by the Agreement Relating to the Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB 18900, approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302 (1966), Certain Rules Relating to International Carriage by Air-Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955, signed at Montreal on 25 September 1975, ratified by the United States 1998 reprinted in S. Exec. Rep. No. 105-20 (1998). These amendments do not affect Article 17.

Article 17 or the Warsaw Act states:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 24(1) of the Warsaw Act states:

> In the cases covered by articles 18 and 19 any action for damages, however unfounded, can only be brought subject to the conditions and limits set out in this Convention.

Article 24(2) of the Warsaw Act states:

> In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

STATEMENT

During the course of Air New Zealand ("ANZ") Flights 122 and 2 from Melbourne, Australia bound for Los Angeles, California through Auckland, New Zealand, on September 5, 2000 Appellant, Tracey Faye Cortez, developed extensive deep vein thrombosis ("DVT"), resulting in pulmonary emboli.[3] She required

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[3]Deep Vein Thrombosis (DVT) and its associated condition, venous

hospitalization upon her arrival in Los Angeles. She was pregnant with her second child and her development of DVT on that flight threatened not only her life, but that of her unborn child.

At no time before September 5, 2000 had the Petitioner ever heard of DVT being associated with long duration air flight. Neither did she know prior to her flight that her pregnancy, coupled with the conditions in the aircraft could cause this life threatening medical condition. At no time prior to, or during the flight did Respondent, ANZ, advise her, orally or visually, about the risk of DVT created by long duration flight. At no time prior to, or during the flight did the Respondent inform the Petitioner of reasonable steps that she could have taken to avoid the DVT risk. Therefore, not only was she unaware of the risk, but, when it developed, she did not have sufficient information to inform the carriers about her medical situation.

ANZ claims to have advised passengers about the risk they faced of developing DVT in flight. They chose to hide what scant "information" it did provide in

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thromboembolism are extraordinarily dangerous conditions associated with high morbidity and mortality. In fact, the World Health Organization considers the risk of DVT associated with long duration air travel, to be so significant that it has commissioned an international study of that health hazard and how to reduce the risk. (*See also*, T.N. Bettes, M.D. and D.K. McKenna, M.D. Medical Advice for Commercial Air travelers, *American Family Physician*, Vol. 60, pp. 801-10 (September, 1999); Medical Advice for Airline Passengers, *Aerospace Medical Assoc.*, at Page 11 (May, 2002); R.S. Hughes, M.D., et al., Frequency of Venous Thromboembolism in Low to Moderate Risk Long Distance Air Travelers, the *New Zealand Air Travelers Thrombosis Study*, The Lancet, Vol. 362, pp. 2039-44 (January, 2003).

the back of its in-flight magazine. It is undisputed that passengers on the flights received no in flight announcements and were not advised to turn to the back of the airline magazine to receive any information about DVT that could save their lives. Indeed, the ANZ magazine does not even mention DVT.

Long before these flights, air carriers generally, and ANZ specifically, knew that international travelers, especially pregnant women, were at risk for developing DVT in flight. Since 1954 reports in the medical literature have linked air travel with DVT and pulmonary embolism. Medical studies have found an increased incidence of DVT among passengers who have recently flown, perhaps in as many as 1 in 10. Conditions contributing toward the increased susceptibility to DVT include: immobility in flight; decreased air pressure; relative hypoxia in the flight cabin and dehydration.

The danger of developing DVT during long duration flights was also long known by the International Air Transport Association ("IATA"), which is the international commercial aviation industry's trade organization of approximately 275 members, including the Respondent. In 1986, IATA recommended that its members give warnings to passengers specifically addressing the risk of DVT. A manual distributed by IATA to its members mentioned that "prolonged immobilization on long flights has a noticeable effect on the circulation, especially in the lower limbs." Because "the opportunity for physical exercise is very limited," since aircraft "aisles will be blocked most of the time by cabin personnel serving passengers," IATA recommends that its members encourage their passengers to "take every opportunity to exercise" especially "during intermediate stops."

IATA's 1986 recommendations, however, went even further: "During flight, passengers should be encouraged to move their feet frequently and exercise the muscles of the legs. When possible, to minimize ankle and feet swelling, the passengers should stand and walk the aisles for a few minutes every hour or so and to elevate the feet as high as possible while sitting."

In 2001, IATA again instructed its member carriers to inform travelers of the risks of DVT when a reservation is booked. IATA also again encouraged carriers to remind passengers - just before boarding and while on board - to drink sufficient fluids, wear loose-fitting clothes, avoid smoking and alcoholic beverages, and perform physical exercises in their seats (particularly for their feet and legs).

Although airlines have known that their operations exposed their passengers to the DVT risk for at least 30 years, some are just now beginning to warn passengers of that danger. At the time of the flight, ANZ acknowledged not only the risk, but also claims to have adopted a program to provide passengers with a warning about DVT. Unfortunately, its program did not mention DVT or its risks. It was not until after this flight that ANZ identified DVT as the risk it was warning about in its earlier program. ANZ did not show any informational video during flights 122 or 2 on September 5, 2000, not did Ms. Cortez receive information about DVT with her ticket or at any time before boarding her flight.

Further, Ms. Cortez did not read ANZ's in-flight magazine. She was not told to read it nor to turn to read page 131 of the magazine for vital health information. Even if she had, there was nothing on that page that mentioned the risk of DVT or how to avoid it. ANZ claims that at the time of these flights it was their

policy to warn passengers of the DVT risk. Since the purported warning was never actually given to or received by Ms. Cortez, ANZ violated its own alleged policy and as a result, the Petitioner suffered a disabling, life-threatening medical event during the course of these flights that could have killed not only Ms. Cortez, but also her unborn child.

Petitioner brought suit in Federal District Court seeking relief under Article 17 of the Warsaw Act. The District Court entered judgment in favor of Respondent, ruling as a matter of law that DVT could not be construed an "accident" under Article 17. In denying the Petitioner any relief for the serious, permanent injuries she sustained due to ANZ operations, the District Court purports to rely upon a definition of "accident" under Article 17, that it believes was adopted by this Court in the 1985 opinion of *Air France vs. Saks*, 470 U.S. 392, 404 (1985). Although left undefined in the Act as drafted in 1929, this Court has consistently opined that the purpose and intent underlying the Act required that a compensable "accident" be an "unexpected or unusual event or happening that is external to the passenger." This Court recognized that where international carriers' failure to act in information in their possession causes injury to a passenger, the Warsaw Act will afford relief.

The District Court erroneously analogized Petitioner's disabling injury to that addressed in *Saks*, because the flight took off, flew, and landed as planned. Under this faulty paradigm, if a passenger suffers an injury causally related to the carrier on a otherwise "normal" international flight, an "accident" may only be found if that passenger informed a crew member of a health concern before he or she is stricken, and then only if the crew member's response to that information

violates a "clear" industry standard or policy. However, this requires that the passenger already know that by taking the flight she is exposed to a potentially fatal risk, and herein lies the whole point of the DVT litigation domestically and internationally. Petitioner did not know she was at risk because ANZ decided not to tell her.

The record here is entirely distinguishable from the facts in *Saks*. In *Saks*, the airline had no prior knowledge or reason to suspect the particular, undisclosed idiosyncratic needs of a single passenger. Accordingly, it would not be considered objectively "unusual" or "unexpected" if a carrier failed to act upon information it neither had nor had reason to anticipate. In this case, ANZ, along with the rest of the international air carrier industry knew of the hazard to all their passengers but failed to meaningfully provide information concerning that hazard to the passengers on the flight.

The Ninth Circuit failed to provide any meaningful analysis of the relevant case law as applied to the present case. It merely adopted its holding in *Caman vs. Continental Airlines*, 455 F.3d 1087 (9th Cir. 2006). The Court decided that the *Caman* decision was not factually based, but rather instructive on the "legal" definition of the term "event" under Article 17. The Court failed to properly analyze the relevant concepts and apply the facts specific to this case that distinguish it from *Caman* and mandate a different result here. The Ninth Circuit, further, did not explain any meaningful distinction between "omission" and "commission" when it used those terms to define "event." Any alleged distinction as applied to Article 17 has, however, been rejected by this Court. See *Olympic Airways vs. Husain* 124 S.Ct 1221, 1229 fn.9.

The concepts and facts here presented are analogous to those reviewed in *Olympic Airways vs. Husain, supra.* There, an individual crew member was made aware of a single passenger's particular sensitivity. The issue there concerned whether an omission (e.g. carriers' failure to respond to information) could satisfy the requirements of an "unexpected" or "unusual" event or happening. Here, an entire airline has ignored information in its possession reflecting a risk it is exposing its passengers to each day. ANZ failed to meaningfully implement any real response to that information. Further, ANZ, and indeed, the entire industry knew of the particular elevated risk of developing DVT that a pregnant passenger is exposed to, yet failed to warn Ms. Cortez. A majority of this Court, in *Husain*, rejected any attempted distinction under Article 17 between carrier *acts* and *omissions*, if passenger injury results.

The discussion in *Husain* addressed a record that presumed the existence and breach of an "industry standard and airline policy." Similarly, the record here contains substantial evidence that a violation of industry standard and the carriers' alleged policies to warn was causally related to a passenger injury. However, the same conclusion would result following the Husain analysis, if Respondent and/or the carrier industry had failed to develop or implement a responsive standard or policy. Such a scenario must logically be considered to be objectively "unexpected" or "unusual" since the carrier industry had specific information, but decided not to act. Certainly from Ms. Cortez's perspective, ANZ's failure to take action to obviate a risk it was aware of, whether due to violation of policy or intentional decision not to develop a program, would be both "unexpected" and highly

"unusual."

It is respectfully submitted that the Ninth Circuit's ruling does not comply with either the purpose or the intent of the Act, and contravenes this Court's admonition concerning how the term "accident" used in Article 17 should be construed. The decision allows Respondent to escape responsibility notwithstanding the fact that its operations and decisions were shown to have had a causal connection to serious passenger injury. The Ninth Circuit has turned its back on a fare-paying passenger, who was severely injured and her unborn child's life threatened, because of the Respondent's operational decisions, and left Ms. Cortez without remedy. Such a ruling is at odds with a reasonable and "flexible" application of the term "accident' utilized in the Warsaw Act.

The record provided substantial unrebutted evidence establishing a connection between the Petitioner's injury and Respondent's operations. This is a case that should be submitted to the trier of fact for resolution.

REASONS FOR GRANTING THE PETITION

I. IT IS IMPORTANT FOR THIS COURT TO DETERMINE THAT THE AIR CARRIER'S FAILURE TO FOLLOW IATA'S STANDARD AND AEROSPACE MEDICAL ASSOCIATION'S RECOMMENDATIONS TO MEANINGFULLY INFORM PASSENGERS OF A SERIOUS HEALTH RISK ASSOCIATED WITH CONDITIONS OF AIR TRAVEL, A RISK KNOWN TO THE CARRIER BUT NOT PASSENGERS, IS AN UNEXPECTED OR UNUSUAL EVENT AS DEFINED BY *SAKS* UNDER ARTICLE 17 SO AS TO IMPROVE AIR CARRIER OPERATIONS AND PROTECT INTERNATIONAL PASSENGERS FROM THE HEALTH CONSEQUENCES OF CARRIER DECISIONS.

This Petition concerns an issue both of national and international significance regarding the application and scope of the term "accident" as used in the Warsaw Act, and directly questions whether the Act will continue to provide meaningful protection for the international air traveling public.

The question raised has global significance because the opinion of the Ninth Circuit potentially jeopardizes the safety of all passengers on international flights that fly from or arrive in the United States. The Ninth Circuit opinion undercuts the well-recognized fundamental purpose of the Act, to encourage safe flying environments on international flights, and to provide international passengers with compensation where a carrier's operations led to a passenger's injury.

The purpose of the Act was not only to foster the development of, at the time, fledgling airline industry by achieving uniformity of rules governing claims, but also to balance the interests of injured passengers in receiving prompt recovery for personal injuries with the interest of carriers seeking to limit potential liability. *See, Generally*, Richard Gardner, "The Warsaw Convention at Three Score Years and Ten," 24 *Air and Space*, L. 114 (1999); *El Al Israel Airlines, Ltd. vs. Tseng*, 525 U.S. 155, 169-170 (1999). The Ninth Circuit decision gives a Federal Court imprimatur to an industry decision to withhold vital health and safety information from passengers, compounded by that industry's refusal to affirmatively act on a hazard about which most international passengers are ignorant.

Now, commercial aviation is an established industry and the countervailing balance of the international passenger's needs has changed. "Protection of the passenger ranks high among the goals which the Warsaw signatories now look to the Convention to serve." *Wallace vs. Korean Airlines*, 214 F.3d 293, 296-297 (2d Cir. 2000). The Warsaw Act promotes passenger safety by ensuring that air carriers remain responsible for maintaining safe operations to benefit the welfare of their passengers. It is internationally recognized that airlines should have incentives to promote the safety and security of their passengers. *Maxwell vs. Aer Lingus Ltd.*, 122 F.Supp.2d 210, 214 (D.Mass 2000); *Salerno vs. Pan Am World Airways, Inc.*, 606 F.Supp. 656 (S.D.N.Y. 1985).

The subsequent amendments to the Act, embodied in the Montreal Accords, resulted in the signatory carriers consenting to a liability system under which they assumed "virtual strict liability" for death or injury to passengers. These amendments

were made, in part, at the behest of the United States, aiming to assure our citizens of adequate protection in the event they sustain injury on an international flight. *Day vs. Trans World Airlines, Inc.*, 528 F.2d 31, 34-37 (2d Cir. 1975).

The United States, dissatisfied with the old liability limits, invoked Article 39 of the Convention and filed a notice of its intent to denounce the Act of 1965. Senator Robert F. Kennedy cogently articulated the concerns of the United States underlying its planned denouncement: "Over two million Americans travel annually on international flights. Assuring that their families are adequately protected in case of accident is, consequently, a matter of wide-spread importance...no one questions the fact that the protection now afforded to international travelers is woefully inadequate." *Id.* At the conference in Montreal, in February 1966, one day before the United States denunciation was to become effective, a compromise was brokered. Within the compromise was an agreement on the part of the carriers to waive the "all necessary measures" defense. *Id.* As a result, the Act is now seen as affording protection for all passengers from hazards of air travel, spreading the cost of that protection among them. *Id.* at 36-37. By waiving the defense of due care, liability under the Act had become considered strict under modern tort theories, although not totally absolute. *Fulop vs. Malev Hungarian Airlines*, 175 F.Supp.2d 651 (S.D.N.Y. 2001).

Thus, the passenger protection purpose of the Act, and the public policy considerations it serves, form an integral part of the analysis regarding the proper scope and application of the Act. An evaluation that ignores these subsequent developments of the Act

would revert the Act to its 1929 incarnation, at the infancy of air travel, and ignore new dangers posed to air travelers fostered by technological changes in the industry over the intervening 77 years. Today, millions of people annually experience commercial air travel at altitudes exceeding 30,000 feet for periods longer than 16 hours. The risks of aviation have changed dramatically in ways unforeseeable in 1929 by the Warsaw Convention delegates. Nonetheless, the original drafters intended to create and created a system of liability and compensation rules to cover all hazards of air travel. *Day vs. Trans World Airlines, supra*, 528 F.2d at 38.

The Ninth Circuit erroneously decided that the DVT suffered by Ms. Cortez was not a result of an "event" as defined in *Saks* and *Husain*. In doing so, it ignored the recognition by this Court that where a passenger falls victim to a medical condition on an international flight, an "accident" will be found if a crew member or the air carrier acted in an affirmative way to cause the injury, or did nothing in response to knowledge that its operations would be likely to cause injury to a passenger. *Olympic Airways vs. Husain, supra*, 540 U.S. at 655. Strangely, the Ninth Circuit did not address Respondent's failure to follow industry standard, established by IATA and the Aerospace Medical Association, during an international flight. It therefore completely skipped over the question of whether such a failure to follow through and comply with a standard, could or should be considered "unexpected" or "unusual" from the standpoint of passengers. The Petitioner, like the other passengers, was unaware of DVT risk before boarding the flight. Due to ANZ's affirmative decision not to follow prevailing standards and its own developed policy,

Petitioner was precluded from learning about the risk of DVT to her and her unborn child, and the steps she could have taken to avoid it.

The Court ignores the holding in *Rodriguez*, which found significance in the absence of evidence in that record concerning an industry standard requiring that international passengers be given DVT warnings. The record here is distinguishable from *Rodriguez*. In the present case, the airlines not only had prior knowledge that its flight conditions led to the suffering of DVT by its passengers, but were directed to issue warnings to international passengers of the dangers of DVT prior to the flight by IATA and by the Aerospace Medical Association. Moreover, the avowed "policy" of the Respondents was to provide DVT risk information to its passengers. Accordingly, in *Rodriguez*, the court could not address whether it was "unusual" or "unexpected" for a carrier to not issue a warning to its passengers, when the industry standard was to do so. The Ninth Circuit in *Rodriguez* was not presented with evidence that the carrier failed to comply "with industry practice at the time." *Rodriguez vs. Ansett Australia, Ltd., supra*, 383 F.3d at 919.

The Respondent knew of the risk of DVT faced by all of its passengers. ANZ claimed it had a policy to inform passengers of the DVT risk associated with conditions of long duration air travel. Yet, despite having this information and being aware of the industry directives, the airline nonetheless, affirmatively and unexpectedly decided not to warn its fare paying passengers about this risk. Instead it merely placed vague information about comfort in the back of its magazine. Accordingly, the record presented establishes that Respondent's affirmative failure, indeed its refusal, to warn was contrary not only to

existing standard, but also to its own avowed policy.

Respondent's response to its own decision that passengers should be given DVT information reflects a conscious decision by the airline not to implement its own avowed policy. Indeed, the airline's actual failure to effectively deliver the warnings to the target - the passengers – is compelling evidence of its failure to follow its own policy. Thus, the Respondent's failure to comply its own policy and IATA's standard is inline with the *Rodriguez* observation concerning what would constitute an "accident" under these circumstances. *Rodriguez vs. Ansett Australia, Ltd., supra,* 383 F.3d at 919.

Establishing standards by silence has been rejected by this Court. *Olympic Airways vs. Husain, supra,* 540 U.S. at 656. This Court gave the example of a passenger who collapsed and stopped breathing, but his failing to advise the airline that he needed help does not preclude the airline from refusing to give aid, despite the fact that no such Federal regulation exists. *Id.* If a danger to passenger's health exists, and the air carrier, but not the passengers, know about it, the air carrier should disclose that danger in a meaningful manner designed to get to the passengers, especially when a standard exists among the international air carrier industry to do so. However, ANZ failed to provide a warning to a passenger, despite the danger to not only her, but also her unborn child.

The determination of standards by silence, apparently adopted by the Ninth Circuit in the DVT cases, is derived from the Fifth Circuit cases of *Witty vs. Delta Airlines, Inc.*, 366 F.3d 380 (5th Cir. 2004) and *Blansett vs. Continental Airlines*, 379 F.3d 177 (5th Cir. 2004). *Witty* is premised wholly upon the erroneous conclusion that FARs are to given general preemptive

effect, and *Blansett* cites *Witty* with approval in support of its own conclusion concerning the preclusive impact of FARs. This analysis amounts to nothing more than a claim that since the FAA regulations do not address DVT warnings, the absence of any such regulation means there is a standard not to provide such a warning.

This argument does not withstand analysis. Indeed, it has been recognized that there is nothing within the FARs to support a conclusion that Congress even intended to preempt the entire filed of aviation safety. See, *Charas vs. Transworld Airlines, Inc.*, 160 F.3d 1259, 1265 (9th Cir. 1998). The FAA merely authorizes the administrator to promulgate *minimum* standards. Thus, Congress has not supplanted and did not intend to preempt the entire field of aviation safety, generally, or for DVT warnings specifically. There is absolutely nothing in the FARs or the above-referenced authorities that lends any support to the notion of preemption by silence. State regulation also plays a role in air safety. See, *Geier vs. American Honda Motor Co.*, 529 U.S. 861, 868 (2000). By the same logic, should the international air carrier industry decide to self regulate and impose stricter standards than the mere minimum, it is free to do so.

Further, the rational relied upon by *Witty* and *Blansett* has previously been rejected by not only the Ninth Circuit in *Charas*, but also California appellate courts in *Vinnick vs. Delta Airlines*, 93 Cal.App.4th 859, 872 (2001); *Aquino vs. Asiana Airlines, Inc.*, 105 Cal.App.4th 1272, 1281-1285 (2003) and *Romano vs. American Trans Air*, 48 Cal.App.4th 1637, 1640-1645 (1996). From the foregoing case law, it is entirely specious to suggest that a DVT warning is at odds with an "existing and comprehensive FAA regulatory

scheme." Indeed, reference to the IATA and Aerospace Medical Association directives should assuage any concern about exposing an airline to multiple standards of care. That is precisely the risk created by the FAR standard by silence paradigm. Every nation has its own aviation regulations, thus every nation that would have an interest in a particular Warsaw case would advocate the application of their own laws. The FAR standard by silence notion creates the risk of applying multiple standards to airline liability, a concept which the Warsaw Act was developed and adopted to avoid.

Thus, it is IATA's decision to mandate that DVT warnings be given to international air passengers that should be recognized and enforced as a clear industry standard. A passenger expects that an air carrier will follow safety directives promulgated by the industry trade association, and failure of ANZ to do so here was "unexpected" and "unusual." IATA, as the trade organization for international air carriers, better understands the realities of international air travel, and as such is best capable of setting forth appropriate warning to be given to international air passengers. The court should look to the international air travel standards to determine that a failure to follow the standards was an "unexpected" or "unusual" departure, and thus an Article 17 accident.

This Court should take this opportunity to reinforce the protective aspects of the Warsaw Act by holding carriers responsible under Article 17, when it is shown that their decision to withhold information from the traveling public was contrary to industry guidelines and resulted in a passenger suffering a serious bodily injury and placing her life and the life of her unborn child in danger.

II. THE RESPONDENT'S FAILURE TO FOLLOW IATA'S DIRECTIVE AND ITS OWN CLAIMED POLICY OF WARNING PASSENGERS ABOUT THE DVT RISK RESULTING FROM CONDITIONS ON BOARD AN INTERNATIONAL FLIGHT IS A CONDITION EXTERNAL TO THE CONTROL OF THE PASSENGER AND WAS AN "EVENT" THAT RESULTED IN AN ARTICLE 17 "ACCIDENT."

This Court has instructed that "cause" is to be expansively construed under Article 17, requiring that only some link in the injury producing "unusual" or "unexpected" event external to the passenger. *Saks, supra*, 470 U.S. at 406; *Maxwell vs. Aer Lingus*, 122 F.Supp.2d 210, 211,fn.2 (D.Mass. 2000).

The Petitioner was unaware of the risk of DVT on the Respondent's flights. As a result, she suffered DVT. "All injury is the product of a chain of causes" and the passenger need only prove "some link in the chain was an unusual or unexpected event external to the passenger." *Air France vs. Saks, supra*, 470 U.S. at 406. The air carrier's awareness of dangerous flight conditions and lack of response to them, not the passenger's sensitivity to cabin conditions, are determinative in a causation analysis. *Olympic Airways vs. Husain, supra*, 540 U.S. 644.

Here the carrier was unquestionably aware of the risk to which it was exposing its passengers. ANZ knew that the information they had was vital in prevention of DVT in passengers. ANZ knew it should disseminate that information to its passengers, as its own trade association directed that DVT warnings be provided. Instead, the Respondent took an easy way

out and decided not to mention DVT in its program or that pregnancy makes a person particularly susceptible to developing DVT in flight. Even if its in-flight magazine mentioned comfort issues, Ms. Cortez did not receive it, and therefore could not have associated that reference in the back of a magazine with a warning about a serious health risk. By not warning and/or by using vague and inconspicuous modes of conveying information, the Respondents ignored the directive, and as a result the Petitioner developed DVT, putting her and her unborn child's lives in danger.

The Ninth Circuit creates a conflict between this Court's holdings in *Saks* and *Husain*, the Ninth Circuit's own decision in *Rodriguez*, and the Fifth Circuit's holding in *Blansett vs. Continental Airlines, Inc.*, 379 F.3d 177 (5th Cir. 2004). In this case, the Ninth Circuit relied on its own decision in *Caman vs. Continental Airlines*, 455 F.3d 1087 (9th Cir. 2006), that attempted to carve out unprecedented distinctions between terms "omission" and "commission" while defining "accident." As noted above, this attempt to distinguish has been recognized by this Court to be irrelevant to proper Article 17 analysis.

Rodriguez, unlike *Caman*, did not make a distinction between different types of inaction, only stating that if a standard to warn exists, then action on the part of the air carrier consistent with that standard is required. In *Saks*, the airline did not fail to act in any way, as it had no knowledge or notice of a single passenger's internal reactions to flight conditions. Here, a standard to warn existed, the carrier chose not to follow it, and injury resulted. This Court has never adopted an analytical paradigm for Article 17 premised upon an alleged distinction based on the type of inaction that causes passenger injury.

Even using the Ninth Circuit's strange and previously unheard of distinction between different classes of "event," a "*commission*" by ANZ occurred here. In the present case, the "*commission*" was not an individual crew member's failure to act on information in order to avoid causing injury to a passenger, but rather an airline-wide decision not to follow the industry standard of providing important, injury-preventing, safety information to its passengers, including those more at risk of developing DVT in-flight. ANZ did not merely passively "omit" to warn its passengers of DVT risk. Instead, it acted by allegedly developing a warning program, but then affirmatively decided to leave DVT information out of it. Placing vague information that does not mention DVT in the back of the in-flight magazine does nothing to warn a pregnant passenger of the danger to her life and the life of her unborn child or developing DVT in-flight.

Thus, ANZ claims to have had a policy to warn, but it then affirmatively decided to completely fail in its implementation of that policy. Unlike an "omission" where no conscious decision to act occurred, here an affirmative "*commission*" deprived Ms. Cortez of the information she could have used to protect herself and her unborn child. The risk would have been significantly decreased had ANZ simply implemented its policy and international directives and had actually given its passengers information about the DVT risk, instead of hoping they might divine the importance of vague information in the back pages of an in-flight magazine. Instead, ANZ's "*commission*" of failing to warn of DVT risk resulted in the Petitioner's injury.

ANZ's failure to take steps to warn a pregnant passenger of that risk is no different, legally or philosophically, from a crew's refusal to reseat a

sensitive passenger. The failure of the carrier to follow and implement its own policy and international directives to provide DVT risk information to its passengers constituted a "commission" as defined in *Caman*. Therefore, the failure of the Respondent to provide a meaningful warning was an "event" under the meaning of an Article 17 "accident."

Manifestly, the condition on which *Caman's* holding was predicated, that the putative accident concerned an act of "omission", is not present in the instant case. The "accident" here is not merely a bare failure to warn, but rather the intentional decision not to deliver information to a passenger. Since carriers use effective media, such as the oral announcements, to advise passengers of other important information, *Caman's* logic would stand for the proposition that a jury could find it unusual or unexpected for the airlines to have used ineffective media techniques to communicate the risk of DVT to passengers.

ANZ does not dispute that it was aware of how its operations were leading to DVT-related injuries and deaths to a significant number of international travelers annually. The Court's opinion analytically does not separate its decision from *Caman*, where it called the failure to warn a mere "*omission*", or "inaction that idly allows an unfolding series of event to reach their natural conclusion." To call a failure to warn of a life-threatening condition a mere "*omission*" under the circumstances here presented is not logical. A passenger does not board an international flight expecting a natural outcome of the flight to be his development of DVT, particularly under circumstances where international directives, standards and airline policy call for such information to be given to passengers in a meaningful fashion.

The carrier knew that passengers were at risk for DVT, and they knew how to prevent DVT from occurring in this case, just as the crew knew of the risk to the passenger and how to eliminate it in *Husain*. The failure to act on that information is unquestionably an important link in the causal chain that resulted in the Petitioner developing a life-threatening medical condition. Excluding the circumstances here presented from the penumbra of Article 17 is entirely inconsistent with the overall scheme of the Warsaw Convention.

Review is necessary to assure these important issues are not overlooked or misinterpreted in the future.

CONCLUSION

In order to protect the safety of international air travelers, to secure uniformity on this important issue of international law and to resolve important conflicts between the decision below and the decisions of other Circuits as well as this Court, plenary review is in order.

Respectfully submitted,

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No. 03-56838

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TRACEY FAYE CORTEZ, an individual, Plaintiff-Appellant,

v.

AIR NEW ZEALAND LIMITED (USA), Defendant - Appellee.

September 26, 2006, Submitted, Pasadena, California

October 2, 2006, Filed

COUNSEL: Clay Robbins III, Magaña, Cathcart & McCarthy, Los Angeles, California, for the appellant.

Rod Margo, Scott Cunningham, Condon & Forsyth LLP, Los Angeles, California, for the appellees.

JUDGES: Before: D.W. NELSON, HAWKINS, and PAEZ, Circuit Judges

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Plaintiff Tracey Faye Cortez appeals the district court's grant of summary judgment to defendant Air New Zealand Limited (USA). We affirm.

Cortez first argues that this court wrongly decided Rodriguez v. Air New Zealand, 383 F.3d 914, 916-19 (9th Cir. 2004), which held that the development of deep vein thrombosis ("DVT") was not an "accident" as that term is used in Article 17 of the Warsaw Convention. Cortez contends Rodriguez is inconsistent with the Supreme Court's decision in Olympic Airways v. Husain, 540 U.S. 644 (2004). In Rodriguez, however, we fully considered and distinguished Husain, 383 F.3d at 918, and, moreover, as a three-judge panel, we lack the authority to disregard Rodriguez.

Cortez next argues that the airline should be liable under the Warsaw Convention because its failure to warn of the risk of DVT is an "accident," that is, "an unexpected or unusual event." See Air France v. Saks, 470 U.S. 392, 405-06 (1985). We recently rejected this argument in Caman v. Continental Airlines, 455 F.3d 1087 (9th Cir. 2006). In Caman, we explained the difference between the "accident" requirement of Article 17 and the defenses available to a carrier under Article 20(1) when a carrier has "taken all necessary measures to avoid the damage":

Attributing liability to an air carrier for failing to do all it can to prevent an injury that is inherent in air travel...improperly shifts the focus of the inquiry from the nature of the event which caused the injury to the alleged failure of the air carrier to avert the same. In addition, interpreting the term "accident" to include a failure to warn of a possible risk of flight would incorporate into Article 17 an inquiry that is properly left to analysis under Article 20(1) once it has been

established that an accident occurred.

455 F.3d at 1092. We went on to conclude that the failure to warn of the DVT risk is not an Article 17 "event." Id.

Although Cortez argues the factual record in his case differs from the facts in Caman, nothing about the holding in Caman is tied to its specific evidence. Rather, the decision turns o the interpretation of two different provisions of the Warsaw Convention, and the nature of the alleged act of omission. See id. Cortez's reliance on footnote four of Caman, 455 F.3d at 1091 n.4, is thus misplaced. Although in Caman we declined to address the general question of whether an air carrier's departure form an industry standard or its own company policy is "unexpected" for the purpose of defining an Article 17 "accident," we specifically concluded that a failure to warn of the risk of DVT is not an "event" for Article 17 purposes. Id. at 1092. If no "event" has occurred, it matters not whether that non-event is "unusual or unexpected." Even though Caman may leave open a question for another day in another context, it definitely resolves the DVT failure to warn issue, and in a way that is fatal to Cortez's claim.

AFFIRMED.

Case No. CV 02-5307-JFW (Shx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

TRACEY FAYE CORTEZ -v- ANSETT AUSTRALIA LTD., et al.

September 5, 2003, Decided

September 8, 2003, Entered

COUNSEL: For Tracey Faye Cortez, Plaintiff: Clay Robbins III, Magaña Cathcart & McCarthy, Los Angeles, California

For Air New Zealand Limited (USA), Defendant: Rod Margo, Scott Cunningham, Condon & Forsyth LLP, Los Angeles, California

JUDGE: PRESENT: HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

OPINION BY: JOHN F. WALTER

OPINION: CIVIL MINUTES - - GENERAL

PROCEEDINGS (IN CHAMBERS): ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On July 25, 2003, Defendant Air New Zealand Ltd. ("Air New Zealand") filed a Motion For Summary Judgment. On August 4, 2003, Plaintiff Tracey Faye Cortez filed her opposition. On August 18, 2003,

Defendants filed a Reply. The Court found the matter appropriate for submission without oral argument. *See* Local Rule 7-15 (the Court may dispense with oral argument on any matter unless otherwise required); Fed.R.Civ.P. 78. The matter was, therefore, removed from the Court's August 25, 2003 hearing calendar and the parties were given advance telephonic notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. Facts and Procedural Background

On June 27, 2000, Plaintiff traveled on Air New Zealand Flight No. NZ1 from Los Angeles, California to Auckland, New Zealand. (UF ¶ 1.) On June 29, 2000, Plaintiff traveled on Air New Zealand Flight No. NZ121 from Auckland to Melbourne, Australia. (*Id.* at ¶ 3.) On September 5, 2000, Plaintiff traveled from Melbourne back to Auckland on Air New Zealand Flight No. NZ 122. That same day, Plaintiff traveled from Auckland back to Los Angeles on Air New Zealand Flight No. NZ2. There was nothing unusual about the operation of the aircraft during Air New Zealand Flight No. NZ2 and there was not malfunction of any equipment or component of the aircraft, including any seat in which Plaintiff was sitting while she was on board the aircraft. (*Id.* at ¶¶ 12-14.) Plaintiff did not report any injury to any Air New Zealand employee at any time during Flight No. NZ2. (*Id.* at ¶ 15.)

Plaintiff alleges that she developed deep vein thrombosis ("DVT") while traveling on Air New Zealand Flight No. NZ2. (*Id.* at ¶ 6.) DVT is a condition in which a blood clot forms in the deep veins of the legs. (Scurr Decl. ¶ 11; Exh. 13 to Robbins Decl.)

Prior to traveling to Auckland in June 2000, Plaintiff was aware that pregnancy is a risk factor for developing DVT. (UF ¶¶ 8-9.) Plaintiff was approximately eight weeks pregnant when she traveled from Los Angeles to Auckland on June 27, 2000 and approximately twenty weeks pregnant when she traveled from Auckland back to Los Angeles on September 5, 2000. (*Id.* at ¶¶ 10-11.)

Air New Zealand provides all passengers on all flights with in-flight magazines. (Paul Decl. ¶ 3.) The September 2000 issue of Air New Zealand's in-flight magazine, "Pacific Wave," which was available to Plaintiff on Air New Zealand Flight No. NZ2, provides as follows:

Long distance international flights can be demanding as the body deals with different time zones and disruptions to normal sleeping and eating patterns. To help your body adjust, we recommend the following steps:

> Rehydrate
> Drink plenty of non-alcoholic liquids to prevent dehydration, fatigue, and headaches.
> Eat Light
> Eat lightly on longer flights.
> Inflight Fitness
> Sitting in one place for a long time can make you feel tired and stiff. These gentle onboard exercises will enhance your well-being during the flight:
> - Occasionally walk down the aisles.
> - Gently bend your neck down towards each shoulder.
> - Move your shoulders upwards, then lower them slowly.

- Wiggle your tows and then raise one foot at a time.
- Rotate your ankles.

Should you experience discomfort during the flight, we can assist with non-prescription medicines. (Exh. A. to Paul Decl.)

II. Standard

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c) The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 256 (1986). A party opposing a properly made and supported motion for summary judgment may not rest upon mere denials but "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). In particular, when the non-moving party bears the burden of proving an element essential to its case, that party must make a showing sufficient to establish a genuine issue of material fact with respect to the existence of that element or be subject to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

An issue is genuine if evidence is produced that would allow a reasonable jury to reach a verdict in favor of the non-moving party. *Anderson*, 477 U.S. at 248. The Court must assume the truth of direct evidence set forth by the opposing party. *See Hanon v. Data~~ta~~products Corp.* 976 F.2d 497, 507 (9th Cir. 1992). However, where circumstantial evidence is presented,

the Court may consider the plausibility and reasonableness of inferences arising therefrom. *See Anderson*, 477 U.S. at 249-50; *TW Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n*, 809 F.2d 626, 631-32 (9th Cir. 1987). In that regard, "a mere 'scintilla' of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the nonmoving party must introduce some significant probative evidence tending to support the complaint." *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997) (internal quotations omitted).

In ruling on a summary judgment motion, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson* 477 U.S. at 249. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from facts are jury functions..." *Id.* at 255.

III. Discussion

Plaintiff argues that Air New Zealand should have warned her about the risks of developing DVT and that its failure to warn constituted an accident for purposes of Article 17 of the Warsaw Convention. 49 Stat. 3000 (1934); T.S. 876 *reprinted in* 49 U.S.C. §40105. Article 17 of the Warsaw Convention provides:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Accordingly, in order to prevail on his complaint against Air New Zealand, Plaintiff must prove that an "accident" was the cause of her injury. *Air France v. Saks*, 470 U.S. 392, 396 (1985). The United States Supreme Court defined "accident" as "an unexpected or unusual event or happening that is external to the passenger." *Id.* at 405. In addition, the Court stated "when the injury results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply." *Id.* at 406.

In this case, there is no evidence that Plaintiff developed deep vein thrombosis from an unexpected or unusual event or happening that was external to Plaintiff. *See, e.g., Margrave v. British Airways*, 643 F.Supp. 510, 512 (S.D.N.Y. 1986) (holding that "extended sitting in an airplane, even in an uncomfortable position, cannot properly be characterized as the sort of 'accident' that triggers an airline's liability under the Warsaw Convention"); *Scherer v. Pan American World Airways, Inc.*, 387 N.Y.S.2d 580, 581 (1976) (finding "no 'accident' as a matter of law" where the plaintiff alleged "bodily injury (namely, thrombophelitis), resulting from merely 'sitting' aboard a Pan Am flight from Tokyo to California"). As a result, Plaintiff has failed to demonstrate that an "accident" was the cause of his injury as that term is used in the Warsaw Convention and defined by the Supreme Court in *Saks*.

IV. Conclusion

For the foregoing reasons, the Court GRANTS Defendant's Motion For Summary Judgment.

IT IS SO ORDERED

The Clerk shall serve a copy of this Minute Order on all parties to this action.